IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**CRIMINAL ACTION**
v.	)	
	)	**No. 04-20047-01-KHV**
SHAWN M. WHITE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On April 28, 2004, a grand jury returned a two-count superseding indictment which charged Shawn M. White with knowing and unlawful receipt, possession, shipment and transportation of an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(1) and 5871 and 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Police discovered the firearm during a search of the trunk of defendant's vehicle on March 2, 2004. This matter is before the Court on defendant's Motion To Suppress Evidence (Doc. #22) filed May 17, 2004 and Motion To Suppress Statement (Doc. #27) filed June 21, 2004. On July 26, 2004, the Court held an evidentiary hearing. For reasons set forth below, the Court overrules the motion to suppress evidence and sustains the motion to suppress defendant's statements during the custodial interrogation at the Fairway, Kansas police department.

Factual Background

Based on the testimony and exhibits at the hearing, the Court finds the following facts:

At approximately 11:10 p.m. on March 2, 2004, Mike Weaver, a police officer in Fairway, Kansas, stopped a gray Mercury Grand Marquis because it had a cracked windshield and had drifted left

to center.[1] Defendant, who was driving the car, appeared to be very nervous and his hands were fidgety. Upon questioning, defendant stated that he possessed pocket knives and that several warrants were outstanding for his arrest. Weaver called for police back up. After confirming the warrants, officers hand-cuffed defendant and, while they were conducting a pat-down of his person, found several pocket knives. Thereafter, officers placed defendant in a patrol car.

Following the arrest, officers searched the passenger compartment of defendant's car. On the driver's side floorboard, they found a cigarette-looking pipe which smelled like burnt marijuana. On the front passenger floorboard, they found a Marlboro cigarette box which contained a glass pipe with residue inside the bowl. Based on his experience in numerous stops involving drug paraphernalia, Weaver knew that such glass pipes were commonly associated with methamphetamine use. After finding the pipes and knives, officers searched the trunk, which was full of miscellaneous items including tools.[2] Inside a duffle bag in the trunk, officers found the sawed-off shot gun which is the subject of this case.

Around 11:25 p.m., Weaver took defendant to the Fairway police department. After gathering background information for about ten minutes, Weaver said that he would read defendant his Miranda rights. Before doing so, Weaver stated that he wanted to ask defendant some questions and see how cooperative he would be that night. Weaver told defendant that defendant was not "stupid" and that defendant knew what was going on. Weaver explained that if he sent the glass pipe to the crime lab and

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[1] Defendant does not challenge the basis of the traffic stop.

[2] Weaver testified that he searched the trunk pursuant to police policy, which requires officers to inventory valuable items in a car before it is towed. As discussed infra, the Court finds that probable cause existed to search the trunk. It therefore does not consider whether the search qualifies as a valid inventory search under the Fourth Amendment. See United States v. Tueller, 349 F.3d 1235, 1238 (10th Cir. 2003) (discussing Fourth Amendment requirements for warrantless inventory searches).

the lab found methamphetamine residue, he could charge defendant with a felony of possessing methamphetamine. Weaver said that the "deal" was that he could write the police report to reflect a charge of possessing drug paraphernalia, a misdemeanor, or possessing methamphetamine, a felony. Weaver advised that depending on defendant's level of cooperation, defendant could decide to "take the whole 100 yards, or deal with the small stuff." Weaver told defendant that he could help in a lot of ways, or he could "sit there like a lump on a log," which was not in his best interest. Weaver told defendant that if he did not cooperate, Weaver would simply list charge after charge and take defendant to the county jail.

Around 11:36 p.m., Weaver read defendant his Miranda rights. Subsequently, defendant told Weaver that a female friend had given him the gun, and that the gun belonged to her boyfriend. Defendant admitted that he had placed the gun in his trunk and stated that he intended to destroy the weapon at a later date. Defendant did not reveal the identity of the female friend or her boyfriend.

Analysis

I. Motion To Suppress Evidence

Defendant argues that the officers did not have probable cause to search the trunk of his vehicle. The government responds that the discovery of two pipes in the passenger compartment created probable cause to search the trunk. "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and "examine the contents of any containers found within the passenger compartment." New York v. Belton, 453 U.S. 454, 460 (1981); see also Thornton v. United States, — U.S. —, 124 S. Ct. 2127, 2129-31 (2004) (Belton applies when officer makes contact after arrestee has left vehicle). To search the trunk of a vehicle, however, an officer must have independent evidence which establishes

probable cause. See United States v. Wald, 216 F.3d 1222, 1226 (10th Cir. 2000). An officer has probable cause to search a trunk if the "totality of the circumstances" suggest a "fair probability" that the trunk contains contraband or other evidence. See United States v. Nielsen, 9 F.3d 1487, 1489-90 (10th Cir. 1993) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). Standing alone, the odor of marijuana in the passenger compartment does not establish probable cause to search the trunk of a vehicle. Nielsen, 9 F.3d at 1491. Rather, an officer must also find corroborating evidence of contraband. Compare United States v. Loucks, 806 F.2d 208, 210-11 (10th Cir. 1986) (probable cause to search trunk based on smell and marijuana found in passenger compartment) and United States v. Ashby, 864 F.2d 690, 692 (10th Cir. 1988) (same) with Nielsen, 9 F.3d at 1491 (no probable cause to search trunk based solely on marijuana odor in passenger compartment). Once probable cause is established, an officer may search the entire vehicle, including the trunk and all containers therein that might contain contraband. United States v. Ross, 456 U.S. 798, 825 (1982); Loucks, 806 F.2d at 210-11.

Defendant argues that the two pipes are consistent with personal use of controlled substances and do not corroborate the existence of contraband in the trunk. Defendant also argues that "it is unlikely that Defendant was using controlled substances in the trunk of his car." Motion To Suppress Evidence (Doc. #22) at 2. In support of his argument, defendant cites United States v. Wald, 216 F.3d 1222 (10th Cir. 2000). That case is distinguishable. In Wald, defendant challenged the warrantless search of his trunk. After stopping the car in which defendant was riding, the officer noticed that defendant had bloodshot and glassy eyes and that defendant and the driver appeared nervous. The officer also noticed an odor of burnt methamphetamine, a road atlas and Visine, which he associated with drug trafficking. To look for drugs, the officer conducted a pat-down search and found two pipes in defendant's pocket. The officer then

searched the trunk, where he found methamphetamine in the speakers. The district court found that the pat-down search was unconstitutional, and the Tenth Circuit agreed.[3] See id. at 1227. Thus, in considering whether probable cause existed to search the trunk, the courts did not consider the pipes. The district court found that the remaining circumstances – a smell of burnt methamphetamine, defendant's nervousness and the appearance of his eyes, Visine and a road atlas – created probable cause to search the trunk. See id. at 1225. The Tenth Circuit reversed, finding that the remaining evidence did not sufficiently corroborate a suspicion of contraband to permit the officers to search the trunk. See id. at 1226-27. The Tenth Circuit stated, however, that under different circumstances, i.e. had the pat-down search been proper, the discovery of drug paraphernalia on defendant's person might provide probable cause to search the trunk. See id. at 1226.

In this case, Officer Weaver found two pipes in the passenger compartment of defendant's car. This evidence sufficiently corroborated a suspicion of contraband to permit officers to search the trunk. See United States v. Parker, 72 F.3d 1444, 1450 (10th Cir. 1995) (rolled up dollar bills with white powder residue found on defendant's person sufficiently corroborated suspicion of contraband to justify searching trunk); United States v. Frain, No. 94-4080, 1994 WL 672681, at *2 (10th Cir. Dec. 1, 1994) (discovery of pipe and small bag of marijuana supported probable cause to search trunk). Accordingly, the Court overrules defendant's motion to suppress evidence found during the search of his trunk.

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[3] The courts found that an officer may conduct a pat-down to search for weapons, but not drugs. See id. at 1226-27.

II. Motion To Suppress Statement

Defendant argues that the statements which he made during custodial interrogation at the Fairway police department were involuntary. Specifically, defendant maintains that Weaver coerced him into making the statements by promising to charge him only with a misdemeanor if he cooperated and threatening to charge him with a felony if he did not cooperate. The government responds that defendant's statements were voluntary because Weaver read defendant his Miranda rights and under the totality of circumstances, the questioning lacked any of the traditional indicia of coercion.

When the government obtains incriminating statements through acts, threats or promises which cause defendant's will to be overborne, it violates defendant's right against self-incrimination under the Fifth Amendment and defendant's statements are inadmissible at trial as evidence of guilt. See United States v. Glover, 104 F.3d 1570, 1579 (10th Cir. 1997) (citing Malloy v. Hogan, 378 U.S. 1, 7 (1964)). In determining whether defendant's statements were voluntary, the Court looks to the totality of circumstances. See United States v. Gonzales, 164 F.3d 1285, 1289 (10th Cir. 1999). Relevant circumstances involve both the characteristics of the accused and details of the interrogation. Id. Such factors include (1) defendant's age, intelligence and education; (2) the length of detention; (3) the length and nature of questioning; (4) whether officers advised defendant of his constitutional rights; and (5) whether officers subjected defendant to physical punishment. Glover, 104 F.3d at 1579 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

In this case, many of the factors weigh against finding that defendant's statements were involuntary. At the time of questioning, defendant was 38 years old. Although the record does not reveal his level of education, the videotape of his conduct during the traffic stop and detention indicates that he has at least

average intelligence. Moreover, defendant had spent time in the state penitentiary, and presumably he was familiar with his rights in the criminal justice system. Defendant was detained for less than two hours, and the length of questioning was only 20 minutes. Moreover, officers advised defendant of his constitutional rights and did not physically punish him. Nevertheless, the Court is concerned with the tactics which Weaver employed to induce defendant's statements: promising to charge him with a misdemeanor if he cooperated and threatening to charge him with a felony if he did not cooperate.

A defendant's statement is involuntary if it is extracted or induced by threats or promises. See United States v. Hernandez, 93 F.3d 1493, 1503 (10th Cir. 1996) (citing Hutto v. Ross, 429 U.S. 28, 30 (1976)). "Incriminating statements obtained by government acts, threats, or promises that permit the defendant's will to be overborne are coerced confessions running afoul of the Fifth Amendment." Griffin v. Strong, 983 F.2d 1540, 1543 (10th Cir. 1993) (quoting United States v. Short, 947 F.2d 1445, 1449 (10th Cir. 1991)). The test is whether the statement was "extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence." Hutto, 429 U.S. at 30 (quoting Bram v. United States, 168 U.S. 532, 542-543 (1897)).

The government argues that Weaver did nothing but truthfully assert that (1) a lab finding of methamphetamine residue on the pipe would support a felony charge in Kansas; and (2) the charges against defendant depended on whether Weaver submitted the case as a misdemeanor or sent the pipe out for further testing. The government contends that these statements do not amount to promises or threats. The Court disagrees, and finds that Weaver's statements regarding the manner in which he would write the police report amount to promises and/or threats which are sufficient to make defendant's statements involuntary.

In determining whether a statement was obtained by a promise, the Third Circuit has stated that

> a "promise" is an offer to perform or withhold some future action within the control of the promisor, in circumstances where the resulting action or inaction will have an impact upon the promisee. A promise is not the same thing as a prediction about future events beyond the parties' control or regarded as inevitable. The issue, then, is whether, from the perspective of the defendant, [the officer's] statements included a promise of a benefit which, in the defendant's understanding, the agent could either grant or withhold.

United States v. Fraction, 795 F.2d 12, 15 (3d Cir. 1986). In Fraction, defendant argued that he confessed based on an officer's promise to bring his cooperation to the attention of the U.S. Attorney and sentencing judge. The Third Circuit found that the officer's statements did not render the confession involuntary, because defendant must have known that the prosecutor and sentencing judge would learn of his confession, regardless of the officer's actions. Id. It therefore found no causal connection between the alleged promise and defendant's decision to confess.

Here, Weaver stated that if defendant cooperated with the questioning, Weaver would write the police report to reflect only a charge of possessing drug paraphernalia, a misdemeanor, and that if defendant did not cooperate, he would send the glass pipe to the crime lab and charge defendant with felony drug possession. These matters were entirely within Weaver's control, and in fact he fulfilled the promise: after defendant made the statements, Weaver wrote the police report to reflect only a misdemeanor charge.[4] Because Weaver obtained the statements by promising to write a more lenient police report, the Court concludes that defendant's statements were not voluntary. See Hutto, 429 U.S. at 30 (statement involuntary if obtained by "any direct or implied promises, however slight"); Griffin v.

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[4] Weaver testified that the federal gun charges resulted from his lieutenant's review of the file. Weaver stated that at the time of the interrogation, he did not contemplate federal gun charges.

Strong, 983 F.2d 1540, 1543-44 (10th Cir. 1993) (promises to protect defendant's health and safety and give him lesser punishment made confession involuntary as matter of law). The Court therefore suppresses the statements which defendant made during the custodial interrogation at the Fairway police department during the late evening hours of March 2, 2004 and/or early morning hours of March 3, 2004.

IT IS THEREFORE ORDERED that defendant's Motion To Suppress Evidence (Doc. #22) filed May 17, 2004 be and hereby is **OVERRULED**.

IT IS FURTHER ORDERED that defendant's Motion To Suppress Statement (Doc. #27) filed June 21, 2004 be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED that this case is set for trial on October 21, 2004 at 9:30 a.m.

Dated this 21st day of September, 2004, at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge